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Letter dated 20 November 2006 from the Permanent Representative of Eritrea to the United Nations addressed to the President of the Security Council

I have the honour to transmit the letter from my Government dated 20 November 2006 addressed to Sir Elihu Lauterpacht, President of the Eritrea-Ethiopia Boundary Commission, in reference to the communications of the Boundary Commission of 7 November 2006. The response of my Government issued on 16 November 2006, in reference to the same letter of the Boundary Commission of 7 November 2006 and two previous letters of President Isaias Afwerki, dated 21 August 2006 and 31 March 2006, addressed to the President of the Boundary Commission, are also enclosed (see annexes I-IV) for further information and clarification of Eritrea's commitment to the delimitation/demarcation process established in article 4 of the Algiers Agreement and to the boundary Award announced by the Boundary Commission on 13 April 2002.

I would be grateful if you could arrange for the present letter and its annexes to be circulated as a document of the Security Council.

(*Signed*) Araya **Desta**
Ambassador
Permanent Representative

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Annex I to the letter dated 20 November 2006 from the Permanent Representative of Eritrea to the United Nations addressed to the President of the Security Council

Eritrea cannot agree with the Commission's decision to schedule a meeting to reconsider the modalities for demarcation of the Eritrea Ethiopia boundary. Had Ethiopia complied with its obligations under the Algiers Agreements to cooperate with the Commission in demarcation of the boundary, the process would have been complete several years ago. In the light of Ethiopia's response to the Commission's invitation letter, it is clear that Ethiopia's position has not changed and that Ethiopia will not countenance implementation of the Award.

Despite its disagreement over the utility of holding such a meeting at this time, however, Eritrea would like to restate its position for the Commission to consider during its deliberations.

Eritrea's position is as expressed in its 16 November 2006 letter. Eritrea remains committed to the delimitation/demarcation process established in article 4 of the Algiers Agreement, and to the boundary Award announced by the Commission on 13 April 2002. In signing the Agreement, the parties undertook to respect the Commission's "final and binding" Award. Eritrea maintains that it is appropriate that the Commission face the problem of Ethiopia's non-compliance directly rather than searching for ways to skirt the issue.

To alter or modify the terms of the 13 April 2002 Award would be beyond the Commission's authority. The Algiers Agreement not only states that the delimitation decision — characterized as "final and binding" — should be based on the pertinent colonial treaties, but also specifically adds that "The Commission shall not have the power to make decisions *ex aequo et bono*." The Commission's Determinations of 7 November 2002 likewise reminded Ethiopia that "article 14 (a) of the demarcation directions provides: 'The Commission has no authority to vary the boundary line.'"

Any attempt to accommodate Ethiopia's demands to change the boundary ruling would therefore be *ultra vires* and without effect. Demarcation cannot be treated as an opportunity to carve out pieces of territory to satisfy the revanchist demands of one of the parties. Eritrea's position is fully consistent with international law and al past international practice on the subject, and Eritrea requests that the Commission reject, once again, Ethiopia's unlawful demands.

(*Signed*) Lea **Brilmayer**
Legal Adviser to the Office of the President of Eritrea

Annex II to the letter dated 20 November 2006 from the Permanent Representative of Eritrea to the United Nations addressed to the President of the Security Council

I refer to the communications of the Boundary Commission of 7 November 2006.

As it is well known, it has been almost five years now since the Boundary Commission announced its Award in accordance with the mandate entrusted to it by the Algiers Agreement. But demarcation of the boundary remains blocked because Ethiopia has been encouraged and continues to flout the rule of law and reject the Award, which is "final and binding" in accordance with the Algiers Agreement.

As pointed out in our communications of 31 March and 21 August 2006, Eritrea has and continues to request firm adherence to the legality and integrity of the Agreements signed while strongly objecting to all endeavours aimed at altering the Award and derailing the process. In this vein, demarcation must be accepted as the unqualified implementation of the "final and binding" Award of the Boundary Commission in accordance with the duly signed agreements.

The notion of derogating the central task of physical demarcation to the "parties", when the Algiers Agreement explicitly stipulates that it is the mandate of the Boundary Commission to implement the final and binding Award, cannot thus be acceptable to Eritrea both in terms of legal principles and because it will only lead to further delays and complication. Allusions to a subsequent role of the United Nations are not pertinent either to the situation as explained in our letter of August 2006. Indeed, the United Nations cannot serve as an appellate court to modify the Award that is final and binding in accordance with article 4.15 of the Algiers Agreement.

(*Signed*) Yemane **Ghebremeskel**
Director
Office of the President

Annex III to the letter dated 20 November 2006 from the Permanent Representative of Eritrea to the United Nations addressed to the President of the Security Council

Allow me to digress somewhat and dwell on some important matters, although they are not of paramount concern at the moment, before focusing on the fundamental and primary themes of my letter.

As you are aware, the border demarcation issue was reactivated in the last few months after four years of paralysis because the United States Administration announced that "it has a plan to expedite demarcation in response to the Ethiopian regime's acceptance of the Boundary Commission decision". Although we did not harbour any illusion, we nonetheless accepted your invitation to attend the meetings in order to factually ascertain the reality. What we have ascertained in the process without any doubt is that the Ethiopian regime continues to reject the final and binding Award.

The second element that we have ascertained without any doubt is the incessant, illegal and major interference by the United States Government in the process. Indeed, this is a well-known fact that cannot be denied by anybody and for which we can submit corroborating evidence if necessary at the appropriate time. We were not surprised by this turn of events. In fact, this was what we had anticipated. If there is a forum for adjudicating these matters, we are prepared to submit our case at the appropriate time.

Your response to my letter contains various issues that provoke further questions and clarifications. But let me focus on the provisions of the Algiers Agreement (article 4.16) in reference to the role of the United Nations, which reads: "The parties request the United Nations to facilitate resolution of problems which may arise due to the transfer of territorial control, including the consequences for individuals residing in previously disputed territory". It must be pointed out that the putative humanitarian consequences that the United Nations may undertake to alleviate, after demarcation is completed and the transfer of sovereign territories duly effected, pale in comparison to the immense sufferings that occurred during the war and the plight that has persisted with the stalling of the demarcation process. Nor would it be difficult for us to seek such assistance when and if the problems unfold and when the time comes. At any rate, we wish to underline that the provisions of article 4.16 cannot in any way question, dilute, transcend or annul the cardinal principle of the Algiers Agreement as enshrined in article 4.15 that states: "The parties agree that the delimitation and demarcation determinations of the Commission shall be final and binding. Each party shall respect the border so determined, as well as the territorial integrity and sovereignty of the other party."

Within the framework of this principle, the Government of Eritrea has not imposed restrictions on the United Nations Mission in Ethiopia and Eritrea that impede the activities and functions of the Boundary Commission. If there are contentions to the contrary, we would like to know which measure has impeded demarcation and in what respect. This is a matter for which we will seek adequate clarification when the time comes. But as you will understand, this is not, indeed, a paramount issue that can arouse controversy now prior to the commencement of demarcation. If the principal aim is to detract the primary issue by depicting us and our stance as equivalent to Ethiopia's fundamental rejection of the Award and its

violation of international law. I can only reassure you that this path would not have any legality, rationality or practical utility. We are of course aware that this is part of the political interference perpetrated by the United States Government as an instrument of "pressure" against us.

I also hold differing views in regard to the observations which the Commission conveyed to the parties in 2003 that you refer to in your letter as well as other related matters. But I do not wish to go into those details to waste your time now before the fundamental and primary issues are settled fully. However, I intend to write to you my views on these matters with full candour and clarity later.

The fundamental and primary issues that need to be settled prior to addressing all other aspects of the process are the following:

1. The Award that is "final and binding" in accordance with the Algiers Agreement has not been accepted to date by the Ethiopian Government. To discuss other matters when this fundamental issue is not resolved has no legal significance or procedural or practical utility. Ethiopia's acceptance of the decision must therefore be ascertained publicly and unequivocally.

2. The details and modalities of demarcation and the "demarcation directions" must be worked out in an environment that is free from (i) political interference, (ii) unlawful and compromising mechanisms, and (iii) loopholes susceptible to distortion.

In the event, I wish to reassure you that unless and until these preliminary ground rules are guaranteed, we have no legal or moral obligation to entertain or accept procedures and arrangements that compromise legality and the "integrity" of the Agreements, or to engage, through intimidation and pressure, in another round of fruitless meetings.

(Signed) Seyoum **Mesfin**

Annex IV to the letter dated 20 November 2006 from the Permanent Representative of Eritrea to the United Nations addressed to the President of the Security Council

Our legal co-agent, Professor Lea Brilmayer, will have already communicated to you our stance on a critical matter that was raised at the London meeting. Allow me to highlight certain dimensions of the issue to reinforce the views expressed through our legal co-agent.

As you are aware, Ethiopia's decision to flout the rule of law and reject the award of the Boundary Commission of 13 April 2002, which is "final and binding" in accordance with the provisions of the Algiers Agreement, has squandered the opportunities for early peace, entailed avoidable complications and precipitated the dangerous situation that is prevailing in our region today.

For our part, we have maintained, for the past four years, our firm adherence to the integrity and legality of the agreements signed and strongly objected to all endeavours aimed at derailing the process through the appointment of special "envoys". Needless to mention, our objections neither emanated from nor were rooted in the credentials and other attributes of the individuals concerned. Our strong objections emanated from the illegality of the objectives and procedures underpinning the various appointments.

In the same vein, there is no doubt that the new effort under way now is ultimately aimed at emasculating and undermining the responsibilities and functions of the Commission and causing the demarcation process to drift to a dangerous path despite its packaging as a serious attempt of "expediting demarcation". As such, Eritrea cannot be expected to accept the new ploy under any legal justifications.

In our view:

- The matter is not indeed about the personalities appointed or their nationality. It is primarily about the underlying objectives of the effort and the mandate, functions and terms or reference of those appointed. It cannot be shrouded in ambiguity or imposed without due clarification in a manner akin to putting the cart before the horse. The terms of reference should therefore be spelled out without any ambiguity and conveyed to the parties in advance.
- No useful purpose will be served by dwelling on, and we do not wish to indulge in, arguments about the credentials of personalities.
- Any exercise of this sort must be predicated on the integrity of the Agreements and respect for the rule of law, which has to be ascertained unequivocally and publicly.
- Demarcation must be accepted as the implementation of the "final and binding" award of the Boundary Commission in accordance with the agreements signed through an unequivocal and official stance.
- Minute details for the demarcation process must be worked out and completed, indeed as this was the case before the interruptions due to Ethiopia's obstruction, in a manner that does not lend itself to delays, manipulations or deleterious consequences.

- Any political interference to influence the actual demarcation process must be avoided and the job performed by experts who strictly abide by and adhere to the legal award and the requisite technical modalities.

As you will understand, Eritrea cannot embrace a process that will have far greater complications and dangerous consequences and that is outside the framework highlighted above in spite of its fervent desire for peace. We cannot indeed drift into a new process that circumvents the agreements signed, that contravenes legality and that is devoid of clarity. Accordingly, I urge you to ensure that the demarcation process is again set on track and carried out in a manner that will guarantee durable peace without confounding political interference.

(*Signed*) Isaias **Afwerki**